Supreme Court, U.S.
FILED
FEB 2 1 2002
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(3)

No. 01-722

IN THE
Supreme Court of the United States

PHOTOGRAMMETRIC DATA SERVICES, INC. and DAVID G. WEBB,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONERS

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Certiorari is warranted in this case: (1) to resolve an ambiguity in the mail fraud statute and to establish the limits of congressional power to define crimes in light of *United States v. Lopez*; and (2) to decide the viability of *McMillan v. Pennsylvania* in light of *Apprendi v. New Jersey*.

1. This is the first case to hold that the mail fraud statute applies to purely intrastate shipments made via private commercial carriers. Anne S. Dudley and Daniel F. Schubert, *Mail and Wire Fraud*, 38 Am. Crim. L. Rev. 1025, 1030 (2001). There is no need to let the issue percolate. Certiorari is appropriate to correct a misinterpretation of one of the most commonly-charged criminal statutes and to serve

the broader purpose of defining the limits on Congress to create new federal crimes.

The mail fraud statute was expanded in 1994 to proscribe the use of private *interstate* carriers in furtherance of a fraud. Respondent argues that the 1994 mail fraud amendment regulates *intrastate* private deliveries. Respondent contends that since the pre-1994 mail fraud statute applied to intrastate deliveries by the Postal Service, the 1994 amendment extending the scope of the statute to deliveries by private carriers must also apply to intrastate deliveries. Respondent glosses over the fundamental distinction between Congress's plenary power under the Postal Clause and its more limited power under the Commerce Clause.

While lower courts have held that the pre-1994 mail fraud statute proscribed both interstate and intrastate misuse of the United States mails (Br. in Opp. 7), this conclusion was premised on Congress's power under the Postal Clause. This does not mean the amended statute has the same breadth in its regulation of private carriers pursuant to the Commerce Clause.

Respondent concedes the wire fraud statute, which is an exercise of congressional authority under the Commerce Clause, does not apply to intrastate use of wires. Yet, Respondent refuses to give the same effect to the 1994 mail fraud amendment.

Rather than focus on the constitutional authority being exercised, Respondent focuses on supposed "significant textual differences" between the wire fraud statute and the 1994 mail fraud amendment and textual similarities between the mail fraud amendment and the pre-1994 mail fraud statute. Br. in Opp. 8.

In fact, the 1994 amendment language is more similar to the wire fraud statute than it is to the pre-1994 mail fraud

statute.[1] The pre-1994 mail fraud statute addresses items "delivered by the Postal Service." It does not confine itself to items delivered by the *interstate* mails. The 1994 amendment, by contrast, is limited to items "delivered by any private or commercial *interstate* carrier." (Emphasis added.) Likewise, the wire fraud statute reaches wire communications "in interstate or foreign commerce."

The 1994 amendment is, at best, ambiguous as to whether it reaches private intrastate deliveries. While Respondent advances one plausible reading of the statute, it is at least as likely that in enacting the 1994 amendment regulating private commerce, Congress, as it did when it enacted the wire fraud statute for the same purpose, limited itself to interstate communications.

It is important for the Court to resolve this ambiguity. First, this will be a continuing issue in mail fraud cases. Second, resolution will aid lower courts that have struggled with the proper interpretation of similar jurisdictional components of other federal criminal statutes.[2]

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[1] Even if the 1994 amendment precisely tracked the language of the earlier version of the mail fraud statute, this would not mean that each applies to intrastate deliveries. Different congressional enactments promulgated at different times for different purposes pursuant to different Constitutional provisions do not necessarily have the same meaning, even where identical language is used. *See, e.g., Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433-34 (1932).

[2] *Compare United States v. Weathers*, 169 F.3d 336 (CA6 1999) (18 U.S.C. § 1958 applied to intrastate cellular telephone call only because placing intrastate call resulted in transmission of interstate signal); *United States v. Paredes*, 950 F. Supp. 584 (S.D.N.Y. 1996) (§ 1958 does not reach use of beeper to contact person in same state), *aff'd w.o. op.*, 162 F.3d 1149 (CA2 1998); *United States v. Barry*, 888 F.2d 1092 (CA6 1989) (intrastate use of mails failed to meet federal jurisdictional requirement of then-existing version of the Travel Act); *United States v. Kammersell*, 7 F. Supp. 2d 1196 (D. Utah 1998) (18 U.S.C. § 875(c) applied to Internet message sent within state, because transmission actually crossed state lines); *United States v. Stevens*, 842 F. Supp. 96 (S.D.N.Y. 1994) (§ 1958 applied to purely intrastate use of paging system, only because paging system transmits signals across state lines

Respondent's reading of the 1994 amendment assumes that Congress could constitutionally regulate the use of intrastate private deliveries. Respondent argues that federal criminal regulation of the purely intrastate misuse of a private carrier falls squarely within the second category of *United States v. Lopez*, 514 U.S. 549 (1995).[3] This conclusion was not so apparent to the panel below, which divided on this issue. Moreover, Respondent's position mistakenly reads *Lopez* as a significant expansion of congressional power.

Respondent acknowledges that each of the cases cited in *Lopez* in its second category entails the direct regulation of an instrumentality of interstate commerce or an effort to protect an instrumentality of interstate commerce from direct harm. *See* Br. in Opp. 10. Yet, Respondent argues that these are merely illustrative and do not define the "outer boundaries" of congressional authority.

Respondent ignores the holding and reasoning of *Lopez*, which was to define, for the first time in decades, specific limitations on congressional power under the Commerce Clause and turns the true import of *Lopez* on its head. The Court has never indicated that the cases it

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regardless of actual location of recipient; § 1958 would not apply to intrastate telephone call) *with United States v. Marek*, 238 F.3d 310 (CA5 2001) (*en banc*) (noting that its reasoning is in conflict with *Weathers*, majority held § 1958 applied to intrastate wire transfer; five dissenting judges concluded that § 1958 did not apply), *cert. denied*, 122 S. Ct. 37 (2001); *United States v. Baker*, 82 F.3d 273 (CA8 1996) (amended § 1952 applied to intrastate use of interstate ATM network); *United States v. Heacock*, 31 F.3d 249 (CA5 1994) (any use of mails met federal jurisdictional requirement of prior version of § 1952); *United States v. Riccardelli*, 794 F.2d 829 (CA2 1986) (same).

[3] The Court in *Lopez*, 514 U.S. at 558-59, stated that the enforcement of criminal law is primarily left to the States and delineated three narrow exceptions to that rule permitting federal regulation under the Commerce Clause of: (1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce; and (3) activities that substantially affect interstate commerce.

carefully chose to illustrate the second *Lopez* category were not intended to define the boundaries of that category. If the examples cited in *Lopez* do not constitute the boundaries of Congress's delineated power, lower courts are left with no guidance as to where the actual outer boundaries lie. Absent such guidance, lower courts can read *Lopez* category two as an almost unlimited grant of power to Congress to create new federal crimes.

Respondent misreads the second *Lopez* category to allow Congress to regulate any use of an instrumentality that has an interstate component, rather than to regulate the instrumentality itself. Under Respondent's reading, the second *Lopez* category completely subsumes the first category, regulation of the use of channels of interstate commerce.[4]

Category one concerns regulation of the use of the channels of interstate commerce. Category one regulation has traditionally regulated things moving or people traveling between states. The interstate movement component in these statutes is essential to allow Congress to regulate activity that would otherwise be left to the states.

Respondent's argument is that the interstate movement component found in so many federal statutes is unnecessary. Respondent's position is that so long as the activity regulated involves the use of a "channel" of interstate commerce that is a sufficient federal nexus. That interpretation of *Lopez* category two completely swallows the first *Lopez* category and gives Congress almost unlimited power to define new federal crimes. That is a perversion of federalism, which presumes states hold most of the power to define crimes subject only to the limited exception of the Commerce Clause.

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[4] *See Paredes*, 950 F. Supp. at 589 ("The weakest link in the government's argument is its failure to set reasonable bounds on federal criminal jurisdiction. . . . After *Lopez*, the government's theory seems a slender reed upon which to rest the exercise of federal jurisdiction . . .").

Under Respondent's view, Congress could have written the wire fraud statute to reach intrastate wires. Similarly, 18 U.S.C. § 2314, proscribing the transportation of stolen goods in interstate commerce, need not require that the property be transported across state lines, as long as the property is transported along some portion of an interstate network. Thus, if property is stolen in Rockville, Maryland and transported three miles along I-270 to Gaithersburg, Maryland, a federal offense would have been committed.

Such regulation is possible only if *Lopez* represents an expanded view of congressional power to federalize crimes. If such a result was, in fact, intended by *Lopez*, the Court should state so explicitly. Conversely, if Respondent is incorrect, the Court should clarify the true, more circumscribed limits of the second *Lopez* category.

2. In the second question presented, certiorari is warranted to decide the viability of *McMillan v. Pennsylvania*, 477 U.S. 79 (1986) in light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Petitioners requested that the Court determine whether facts exposing a defendant to a specific sentencing range must be proven to a jury beyond a reasonable doubt. This question has been flagged by several Justices in recent years, but has yet to be resolved.

This issue calls into question the constitutionality of current practices under the Sentencing Guidelines. Respondent contends that the Court has already passed on the constitutionality of the Guidelines and endorsed the sentencing practices thereunder, citing *Mistretta v. United States*, 488 U.S. 361 (1989) and *Edwards v. United States*, 523 U.S. 511, 513-14 (1998).

Mistretta concerned a separation of powers challenge to the Guidelines. It is not instructive on whether the sentencing practices in this case can withstand due process and Sixth Amendment challenges.

The citation to *Edwards* is even less enlightening. The passage cited by Respondent (the Guidelines "instruct *the*

judge . . . to determine" the type and quantity of drugs for which a defendant is accountable "and then to impose a sentence that varies depending upon the amount and kind") is merely an observation as to what the Guidelines require. Br. in Opp. 14. The *Edwards* Court did not purport to address the constitutionality of those practices.[5]

Respondent contends that *Apprendi* does not support a challenge to the constitutionality of the Guidelines. That argument is baseless. *Apprendi* states that "[i]t is unconstitutional . . . to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed," *Apprendi*, 530 U.S. at 490, and therefore casts doubt on the constitutionality of the Guidelines. Indeed, Justice O'Connor's dissent noted *Apprendi* could apply "to all determinate-sentencing schemes in which the length of a defendant's sentence within the statutory range turns on specific factual determinations (*e.g.*, the federal Sentencing Guidelines)." *Id.* at 544. Review is warranted to resolve this question which was raised, but left unanswered, in *Apprendi*.

Respondent apparently recognizes that, if certiorari is not granted, the question presented here is likely a hold for *Harris v. United States*, *cert. granted*, 122 S. Ct. 663 (December 10, 2001), in which the Court granted review to resolve whether a finding of "brandishing," resulting in an increased mandatory minimum sentence under 18 U.S.C. § 924(c)(1)(A), must be alleged in the indictment and proved beyond a reasonable doubt. Br. in Opp. 13. This case is different and should not be held, the Respondent contends, because *Harris* involves an increase in the statutory minimum sentence, whereas this case involves an increase in the prescribed sentencing range under the Guidelines. *Id.*

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[5] In fact, the Court stated, "we need not, and we do not, consider the merits of petitioners' statutory and constitutional claims." *Edwards*, 523 U.S. at 516.

This case and *Harris* do, however, present the same constitutional sentencing issue. Both federal statutes and the Guidelines are binding on the courts. From a constitutional perspective, it does not make a difference whether the mandatory minimum range of punishment to which a defendant is exposed is set forth in a statute, or in the Guidelines. Regardless of the source of the minimum sentence, the impact on the defendant is precisely the same. *See Apprendi*, 530 U.S. at 522 ("What matter[s is] simply the overall increase in the punishment provided by law") (Thomas, J., concurring); Benjamin J. Priester, *Constitutional Formalism and the Meaning of Apprendi v. New Jersey*, 38 Am. Crim. L. Rev. 281, 296 (2001) (elaborating and citing cases).

The constitutional question presented here – whether the facts that expose a defendant to a specific sentencing range must be proved to a jury beyond a reasonable doubt – is broader than the sentencing issue presented in *Harris*. Nevertheless, *Harris* could be decided in ways that would reach the question presented here; at a minimum, this case should be held until after the Court rules in *Harris*.

If *Harris* is not resolved as a matter of statutory interpretation, the continuing viability of *McMillan* in light of *Apprendi* will likely be resolved by *Harris*, because the defendant's mandatory minimum sentence was based on an uncharged and unproved post-trial factual finding. If *Harris* is resolved by overruling *McMillan* the Court could grant certiorari and then vacate and remand in light of *Harris*.

Certiorari will be warranted even if *McMillan* is not overruled. Respondent concedes that there is a significant split among the circuits on the issue of whether relevant conduct that would substantially increase a sentence must be proved by clear and convincing evidence or some other evidentiary standard. Br. in Opp 15. *See United States v. Watts*, 519 U.S. 148, 156 & n.2 (1997) (recognizing split and collecting cases); see also *Id.* at 170 ("the cases raise a

question of recurrent importance in hundreds of sentencing proceedings in the federal criminal system.") (Kennedy, J., dissenting). Nevertheless, Respondent contends that this case is not the appropriate vehicle for resolving that split because the sentences imposed are not sufficiently "extreme" or "dramatic" to implicate due process concerns. Br. in Opp. 15-16. That argument cannot withstand scrutiny.

The Government proved that defendants' actions resulted in an amount of loss of $19,008. This should have exposed Mr. Webb only to a 3-level increase in his offense level under (then applicable) § 2F1.1(b)(1)(D) of the Guidelines. The district court's $435,000 amount of loss finding, however, resulted in a base offense increase of 9 levels causing the defendants to be sentenced at an offense level of 17, rather than 11. This finding tripled the minimum prison sentence to which Mr. Webb was exposed and more than doubled his maximum prison sentence exposure. It also meant the difference between a restitution order of less than $20,000 and one for $435,000.

The impact was similar on the corporate defendant. The amount of loss finding increased the corporate defendant's restitution order from $20,000 to $435,000 and increased its minimum fine from $36,000 to $522,000. Thus, the corporate defendant was required to pay $957,083 in fines and restitution on a proved loss of less than $20,000, a 48-1 ratio.

Such increases are of constitutional significance. "[I]t can hardly be said that the potential doubling of one's sentence . . . has no more than a nominal effect." *Apprendi*, 530 U.S. at 495 (stating that the increase in years behind bars is "unquestionably of constitutional significance"); *Glover v. United States*, 531 U.S. 198, 203-04 (2001) ("our jurisprudence suggests that any amount of actual jail time has Sixth Amendment significance"; criticizing the Government's position as "not well considered . . . because there is no obvious dividing line by which to measure how

much longer a sentence must be for the increase to constitute substantial prejudice").

This case presents an ideal factual scenario to resolve what appears to be irreconcilable tension between *McMillan* and *Apprendi* and to resolve a circuit split on the question of what standard of proof should be used in cases where "other relevant conduct" findings are used to increase a sentence substantially.

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For the reasons stated above and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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